ORIGINAL

No. 03-7434

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

DANIEL BENITEZ, PETITIONER

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

In Zadvydas v. Davis, 533 U.S. 678 (2001), this Court avoided constitutional concerns by interpreting 8 U.S.C. 1231(a)(6) to limit to a "reasonable time" the period that permanent resident aliens may be detained following final orders directing their removal from the United States. Applying that standard, the Court held that a resident alien generally may not be detained under Section 1231(a)(6) for more than six months after being ordered removed, if the alien demonstrates that there is not a significant likelihood of removal in the reasonably foreseeable future. The questions presented in this case are:

1. Whether the six-month rule of Zadvydas applies to an alien who was apprehended at the border of the United States and ordered excluded from the United States.

2. If not, whether petitioner's release from immigration detention is otherwise required under 8 U.S.C. 1231(a)(6) and the canon of constitutional avoidance, despite a recent determination by immigration officials that petitioner should not be released.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 337 F.3d 1289. The order of the district court (Pet. App. 27a-31a) and the report and recommendation of the magistrate judge (Pet. App. 32a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2003. The petition for a writ of certiorari was filed on October 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is one of approximately 125,000 Cuban nationals, many of them convicted of crimes in Cuba, who attempted

to enter the United States illegally during the 1980 Mariel boatlift. After Cuba refused to accept the return of Mariel Cubans who were stopped at the border and denied entry into the United States, the Attorney General, through the Immigration and Naturalization Service (INS), soon paroled all but a few hundred of those Cubans into this country pursuant to his discretionary authority under 8 U.S.C. 1182(d)(5) (1976 & Supp. IV 1980). See generally Pet. App. 2a & n.1; Fernandez-Roque v. Smith, 734 F.2d 576, 578-579 (11th Cir. 1984); Palma v. Verdeyen, 676 F.2d 100, 101-102 (4th Cir. 1982).

Section 1182(d)(5)(A) then authorized, and as amended continues to authorize, the Attorney General (now the Secretary of Homeland Security[1]) to parole aliens applying for admission to the United States into the country "temporarily under such conditions as he may prescribe" and only for "urgent humanitarian reasons or significant public benefit," but it provides that "such parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General, the purposes of the alien's parole have been served, the alien shall forthwith be

[1] On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security and assigned to its Bureau of Immigration and Customs Enforcement (ICE). See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (6 U.S.C. 251(2)). Respondent Mata is the successor to the INS District Director who was named as the lead respondent to the habeas corpus petition in the district court and as the respondent in this Court.

returned to custody, "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

In 1984, the United States and Cuba reached an accord concerning immigration between the two countries, including the return of 2746 specified individuals with serious criminal backgrounds or mental infirmities. See Immigration Joint Communique Between the United States of America and Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057, 1984 WL 161941. Approximately 1646 Mariel Cubans have been repatriated to Cuba under the 1984 accord. The most recent repatriations occurred in October 2003. The next repatriations are scheduled to occur in December 2003.

Pursuant to Section 1182(d)(5)(A), the Attorney General promulgated regulations in 1987 governing the parole and revocation of parole of Mariel Cubans (defined to include any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980) pending either an exclusion hearing or the alien's return to Cuba or another country. See 8 C.F.R. 212.12; 52 Fed. Reg. 48,802 (1987). Those regulations supplement the general regulations governing the parole and release of aliens who are seeking admission to the United States. See 8 C.F.R. 212.5, 241.4.

In 1990, Congress added a new statutory provision, 8 U.S.C. 1226(e) (1994), which limited the Attorney General's power to release excludable aliens on parole. See Immigration Act of 1990, Pub. L. No. 101-649, § 504(b), 104 Stat. 5050. Section 1226(e)(1) provided that, "[p]ending a determination of excludability, the

Attorney General shall take into custody any alien convicted of an aggravated felony." 8 U.S.C. 1226(e)(1) (1994). Section 1226(e)(2) and (3) then provided that the Attorney General "shall not release such felon from custody" unless the Attorney General determined under 8 U.S.C. 1253(g) (1994) that the alien's country of removability would not accept his return and, inter alia, the Attorney General concluded, after review of the alien's request for release and the severity of the alien's felony, that "the alien will not pose a danger to the safety of other persons or to property." 8 U.S.C. 1226(e)(2) and (3) (1994). Section 1226(e) otherwise left unaffected the Attorney General's discretion to grant, deny, or revoke parole under Section 1182(d)(5)(A).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, Congress added a new Section 1231 to Title 8 of the United States Code. Section 1231(a)(2) requires the detention, during the statutory 90-day removal period, of aliens who have been ordered removed from the United States, including aliens who have been stopped at the border and were regarded as "excludable" under prior law.[2] Section 1231(a)(6) then provides that an alien ordered

[2] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See Landon v. Plasencia, 459 U.S. 21, 25 (1982); 8 U.S.C. 1182 (1994). Aliens who had gained lawful admission to the United States or entered without permission were "deportable." See 8 U.S.C. 1251 (1994). Under IIRIRA, the new statutory category of "inadmissible" aliens includes both aliens who have not entered the country and formerly were termed "excludable," and aliens who entered the United States without permission and formerly were termed "deportable." See 8 U.S.C. 1182(a).

removed who is inadmissible under 8 U.S.C. 1182 or deportable for the commission of a specified crime, or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, "may be detained beyond the [90-day] removal period."

2. In June 2001, this Court decided Zadvydas v. Davis, 533 U.S. 678, which addressed the legality of the continued detention under 8 U.S.C. 1231(a)(6) of aliens who initially had been granted the status of lawful permanent residents and later were ordered removed, but who could not be removed within the 90-day statutory removal period. The Court construed Section 1231(a)(6) "to contain an implicit 'reasonable time' limitation." 533 U.S. at 682. In particular, to avoid "a serious constitutional problem," id. at 690, that would arise from indefinite detention of the former permanent resident aliens, the Court construed the Attorney General's authority to detain such aliens under Section 1231(a)(6) to be limited to the period of time reasonably necessary to remove them from the United States. Id. at 689. After that point, the Court reasoned, "detention no longer 'bears a reasonable relation to the purpose for which the individual was committed.'" Id. at 690 (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972) (brackets omitted)). "[F]or the sake of uniform administration," the Court further determined that detention for a period of six months is presumptively reasonable. Id. at 701. After that presumptively

reasonable period, if "the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." Ibid.

The Court emphasized in Zadvydas that "[a]liens who have not yet gained initial admission to this country would present a very different question," which was not before the Court. 533 U.S. at 682. Furthermore, in its analysis of the potential constitutional problem posed by detention of deportable permanent resident aliens, the Court rejected the United States' reliance on Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), even though that case "involve[d] indefinite detention." 533 U.S. at 693. In Mezei, the Court held that the detention of an alien who unsuccessfully sought entry into the United States but could not be removed did not violate due process. See 345 U.S. at 210-216. In Zadvydas, the Court stated that Mezei "differs from [Zadvydas] in a critical respect," because Mezei's detention on Ellis Island was a continuation of his exclusion rather than a successful entry into the United States. 533 U.S. at 693. The Court noted that aliens stopped at the border remain applicants seeking initial admission to the United States even if they are physically present in the country. Ibid. Mezei's status as an excludable alien at the border, the Court explained in Zadvydas, "made all the difference." Ibid.

3. In this case, the Eleventh Circuit -- in agreement with a majority of the circuits that have addressed the issue, but in

conflict with the Sixth and Ninth Circuits -- rejected the argument that Zadvydas's six-month rule requires the release from detention of an inadmissible Mariel Cuban with an extensive criminal history.

a. In June 1980, petitioner was apprehended at the border and prevented from entering the United States. In July 1980, the INS granted petitioner temporary immigration parole pursuant to 8 U.S.C. 1182(d)(5)(A). In June 1983, while petitioner was on immigration parole, he was convicted in Florida of grand theft, for which he received a sentence of three years of probation. Pet. App. 2a, 33a.

In April 1985, the INS denied petitioner's application to adjust his immigration status to that of a lawful permanent resident of the United States. The INS determined that petitioner's theft conviction rendered him categorically ineligible to receive that immigration benefit. Pet. App. 3a, 33a; C.A. R.E. Tab 5, Exh. C. In March 1990, the INS denied petitioner's second application for adjustment of his immigration status because petitioner had failed to prosecute the application. Pet. App. 33a.

In April 1993, petitioner was convicted in Florida state court, after entering a guilty plea, of armed burglary of a structure, armed burglary of a conveyance, two counts of armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed weapon, aggravated battery, and unlawful possession, sale, or delivery of a firearm with an altered or removed serial number. Petitioner was sentenced to a

20-year term of imprisonment for those convictions. Pet. App. 4a, 33a; C.A. R.E. Tab 5, Exh. E.

In June 1993, while petitioner was serving his state sentence, the INS commenced exclusion proceedings against petitioner based on his criminal convictions and his lack of valid documents for entering the United States. In December 1994, an immigration judge determined that petitioner is excludable and ordered him removed to Cuba. Petitioner did not appeal his exclusion order. Pet. App. 4a, 33a.

In 2001, at the completion of petitioner's state prison term, the INS returned petitioner to immigration custody. Pet. App. 5a (indicating that transfer from state prison occurred in October 2001); but see C.A. R.E. Tab 1, at 4 (habeas petition, alleging that transfer occurred on July 27, 2001). As required by the parole regulations applicable to Mariel Cubans, see 8 C.F.R. 212.12(g), the INS (now ICE) has reviewed petitioner's custody status on an annual basis. In January 2002, petitioner received notice that he would be releasable under the parole regulations when INS determined that suitable community sponsorship or placement had been found. Pet. App. 6a, 34a; see 8 C.F.R. 212.12(d) and (f). In March 2003, however, ICE revoked the earlier approval of parole because it determined that petitioner had participated in planning an escape. Pet. App. 6a; see 8 C.F.R. 212.12(e).

In July 2003, ICE again reviewed petitioner's custody status. In September 2003, petitioner was notified that he is a candidate

for release and that he will be placed in a substance-abuse treatment program when space becomes available. We are advised by ICE that petitioner's placement is expected to be in a residential program in a federal facility, and that the placement is unlikely to occur before February 2004, or to be completed before July 2004.

b. Meanwhile, in January 2002, petitioner filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the Northern District of Florida. In his petition, petitioner claimed that he had been "unlawfully detained by I.N.S. for more than Five (5) months," since his release from state prison. C.A. R.E. Tab 1, at 4 (habeas petition); see Pet. App. 28a-29a, 33a-36a.

Agreeing with the report and recommendation of a federal magistrate judge (Pet. App. 32a-37a), the district court determined in June 2002 that petitioner's detention is statutorily authorized under 8 U.S.C. 1231(a)(6), and is not limited by the six-month rule of Zadvydas because petitioner "is not a 'resident alien,' as the petitioners were in Zadvydas. Instead, he is a non-admitted parolee, and, as Zadvydas itself explained, that distinction makes a crucial difference." Pet. App. 29a. The district court concluded that because petitioner was denied admission into the United States, he does not enjoy the same constitutional rights as an alien who accomplished entry into the United States. Id. at 30a. Accordingly, the court determined, petitioner may be detained until his removal to Cuba or another nation is possible. Id. at 30a-31a.

c. The court of appeals affirmed in a published per curiam opinion. Pet. App. 1a-26a. The court of appeals explained that the language of 8 U.S.C. 1231(a)(6) "expressly authorizes the Attorney General to detain aliens beyond the 90-day removal period." Pet. App. 9a. The court further noted that petitioner -- despite his initial parole in 1980 under 8 U.S.C. 1182(d)(5)(A), and unlike the former resident aliens in Zadvydas - "is, and remains, an inadmissible alien and is similar to any other alien who has not gained entry and is stopped at this country's border." Id. at 15a-16a.[3]

The court of appeals determined (Pet. App. 17a-19a) that both Mezei and Eleventh Circuit precedent foreclose petitioner's constitutional challenge to his detention, because those cases establish that "aliens seeking admission to the United States * * * must be content to accept whatever statutory rights and privileges they are granted by Congress." Id. at 18a (quoting Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (en banc)); see Mezei, 345 U.S. at 212.

The court then rejected petitioner's argument that the six-month rule of Zadvydas "appl[ies] uniformly to all types of aliens." Pet. App. 20a. Specifically agreeing with the Eighth

[3] The court of appeals determined that the government had waived in the district court any argument that petitioner's detention is governed by the pre-IIRIRA law that authorized detention of excludable aliens at the time petitioner's final order of exclusion was entered, see, e.g., 8 U.S.C. 1226(e) (1994), rather than current Section 1231(a)(6). See Pet. App. 8a & n.13. The government does not contest that determination.

Circuit's analysis in Borrero v. Aljets, 325 F.3d 1003 (2003), the court of appeals "interpret[ed] Zadvydas as limiting the detention period of only those aliens whose continued confinement raises serious constitutional doubt, i.e., resident aliens who have effected entry." Pet. App. 21a-22a.

In support of its determination that Zadvydas's interpretation of Section 1231(a)(6) does not limit petitioner's detention, the court of appeals cited five considerations. First, the court noted that Zadvydas expressly distinguished the detention of the former permanent resident aliens in that case from the detention of aliens stopped at the border and denied admission. Pet. App. 22a (quoting Zadvydas, 533 U.S. at 682). Second, the court observed that Zadvydas's interpretation of Section 1231(a)(6) "ke[pt the statute] from being applied unconstitutionally" in the context of former resident aliens, and concluded that "it is only the constitutionally problematic aspects [of Section 1231(a)(6)] which are subject to the construction that avoids the problem." Id. at 23a (quoting Lin Guo Xi v. INS, 298 F.3d 832, 841 (9th Cir. 2002) (Rymer, J., dissenting)). Third, the court of appeals explained that whereas Zadvydas did not leave any "unprotected spot in the Nation's armor" against the initial entry of inadmissible aliens into the United States, 533 U.S. at 695-696 (quoting Kwong Hai Chew v. Colding, 344 U.S. 590, 602 (1953)), requiring the release of inadmissible aliens, after they have been stopped at the border and denied entry, would intrude upon the Executive Branch's enforcement of the immigration laws and "subject the residents of this nation

to greater security risks." Pet. App. 24a. Fourth, the court stated that extending Zadvydas's six-month rule to inadmissible aliens would be contrary to Congress's grant to the Executive Branch of discretionary power over the detention or parole of those aliens. Id. at 24a-25a. Fifth, the court noted that IIRIRA "sought to tighten immigration regulations," and it would contradict that congressional purpose -- and "pervert" the congressional authorization of discretionary parole -- to read Section 1231(a)(6) as vesting inadmissible aliens with an entitlement to the "gift" of parole. Id. at 25a-26a.

ARGUMENT

The courts of appeals disagree whether the six-month rule of Zadvydas v. Davis, 533 U.S. 678 (2001), should be extended to limit the detention of arriving aliens who are stopped at the border and denied admission to the United States, and who cannot be removed to another country. The issue has obvious importance for thousands of detained aliens, and great significance for enforcement of the immigration laws, national security, and public safety. This case presents a suitable vehicle for addressing the issue. The petition therefore should be granted.

I. THERE IS A WELL-DEVELOPED CIRCUIT CONFLICT CONCERNING THE EXTENSION OF ZADVYDAS'S SIX-MONTH RULE TO ALIENS WHO HAVE BEEN STOPPED AT THE BORDER AND DENIED ADMISSION TO THE UNITED STATES, BUT WHO CANNOT BE REMOVED

The courts of appeals are divided on the question whether Zadvydas's limitation on the duration of post-removal-order detention under Section 1231(a)(6) applies to aliens who have been

stopped at the border and denied admission. The Sixth Circuit and the Ninth Circuit apply Zadvydas's six-month rule to limit the detention of such aliens when they cannot be removed from the United States. See Martinez-Vazquez v. INS, 346 F.3d 903 (9th Cir. 2003) (excludable Mariel Cuban); Arango Marquez v. INS, 346 F.3d 892 (9th Cir. 2003) (same); Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir.) (en banc) (same), cert. denied, 123 S. Ct. 2607 (2003); Lin Guo Xi v. INS, 298 F.3d 832 (9th Cir. 2002) (inadmissible alien ordered removed under IIRIRA).

The Third, Fifth, Eighth, and Eleventh Circuits, by contrast, have determined that Zadvydas does not limit the detention of aliens who have been denied admission into the United States. See Pet. App. 1a-26a; Sierra v. Romaine, No. 02-2826, 2003 WL 22451726 (3d Cir. Oct. 29, 2003); Borrero v. Aljets, 325 F.3d 1003 (8th Cir. 2003); Rios v. INS, 324 F.3d 296 (5th Cir. 2003). Similarly, the Tenth Circuit has stated after Zadvydas that Section 1231(a)(6) preserves agency discretion whether to deny immigration parole to an excluded Mariel Cuban. Sierra v. INS, 258 F.3d 1213, 1219 (10th Cir.), cert. denied, 534 U.S. 1071 (2001). See also Hoyte-Mesa v. Ashcroft, 272 F.3d 989 (7th Cir 2001) (rejecting, after Zadvydas, due process challenge to Mariel Cuban's detention), cert. denied, 537 U.S. 846 (2002).

II. THE ISSUE WHETHER ZADVYDAS LIMITS THE POST-REMOVAL-ORDER DETENTION OF MARIEL CUBANS AND OTHER ALIENS WHO WERE STOPPED AT THE BORDER WHILE ATTEMPTING TO ENTER ILLEGALLY HAS GREAT IMPORTANCE

The Sixth and Ninth Circuits require the release into the United States of dangerous aliens, including recidivist aliens like petitioner who have committed serious crimes, despite the political Branches' determination that those aliens should not be allowed to enter the United States. Those circuits have opened a back door into the United States for aliens from nations with which the United States does not have full diplomatic relations, or that do not cooperate in repatriation of their nationals. Such aliens now know that even if they are caught while attempting to enter the United States illegally, immigration authorities may be powerless to stop them from living at large in this country -- even if they commit crimes in this country pending their removal. The new avenue of unlawful entry created by the Sixth and Ninth Circuits encourages illegal migration by inadmissible aliens, cf. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 163-164, 187-188 (1993), and creates an obvious gap in border security that could be exploited by hostile governments or organizations that seek to place persons in the United States for their own purposes.

The Bureau of Immigration and Customs Enforcement (ICE) reports that it presently is detaining approximately 2269 arriving aliens who are under final orders of exclusion or removal. More than half of those detained aliens, including 920 Mariel Cubans, have been detained for more than six months. District courts in

the Sixth and Ninth Circuits, applying their circuit precedent extending Zadvydas, thus far have required ICE to release 63 aliens who had been denied admission to the United States and did not satisfy the agency requirements for obtaining a discretionary release on parole pending their removal. The ongoing, court-ordered releases of those aliens, whom the political Branches have determined should be denied entry into the United States and release into the community even under conditions of supervision, creates precisely the "unprotected spot in the Nation's armor" that Zadvydas expressly disavowed. 533 U.S. at 695-696; see Pet. App. 23a-24a; Sierra, 2003 WL 22451726, at *12; Lin Guo Xi, 298 F.3d at 842 (Rymer, J., dissenting).

III. THE DECISION OF THE ELEVENTH CIRCUIT IN THIS CASE IS CORRECT

A. Petitioner's Detention Is Authorized By Statute

By its plain terms, 8 U.S.C. 1231(a)(6) states that the Attorney General "may" detain specified aliens beyond the 90-day statutory removal period, and does not limit the duration of that detention. The statutory language "suggests discretion," Zadvydas, 533 U.S. at 697, and "literally * * * sets no limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained," id. at 689 (internal quotation marks omitted).

As four circuits have concluded, the Sixth and Ninth Circuits are incorrect in their view that Zadvydas substitutes a universally applicable six-month rule for Congress's rule of discretionary

detention and release. Zadvydas addressed only Section 1231(a)(6)'s application to "aliens who were admitted to the United States but subsequently ordered removed." 533 U.S. at 682. This Court noted that detention of "[a]liens who have not yet gained initial admission to this country would present a very different question." Ibid. In distinguishing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Court observed that, even if aliens stopped at the border are paroled into the United States, they remain as a matter of law applicants seeking initial admission to the United States. 533 U.S. at 693 (citing cases). And the Court reaffirmed that the "critical" distinction between aliens who were stopped at the border and aliens who were admitted into the United States makes "all the difference" in a constitutional analysis of the aliens' detention. Ibid.

Furthermore, the canon of constitutional avoidance, which supported the Court's inference of an unarticulated statutory limitation on the detention of the aliens before the Court in Zadvydas, does not support a similar non-textual limitation on petitioner's detention. The constitutional-avoidance canon is grounded in "respect for Congress" and "seeks to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction." Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998). Because there is no due process problem when Section 1231(a)(6) is applied as written to aliens who were stopped at the border and

denied admission, "read[ing] an implicit limitation into the statute," Zadvydas, 533 U.S. at 689, with respect to those aliens would create, rather than minimize, the sort of friction between the Judicial and Legislative Branches that the canon of constitutional avoidance relied upon in Zadvydas is intended to avoid. See Pet. App. 22a-23a; Sierra, 2003 WL 22451726, at *10-*12; Borrero, 325 F.3d at 1006-1007; Lin Guo Xi, 298 F.3d at 841-842 (Rymer, J., dissenting).

B. Zadvydas Does Not Require Petitioner's Release From Immigration Detention

The dissenting Justices in Zadvydas expressed concern that considerations of consistency might result in extending Zadvydas's interpretation of Section 1231(a)(6) to the distinct situation of aliens stopped at the border before entry. 533 U.S. at 710 (Kennedy, J., dissenting). But even if that were true to some extent despite the contrary language in the majority opinion in Zadvydas and the critical constitutional difference discussed above, Zadvydas would not dictate that petitioner must be released. In the context of deportable resident aliens, Zadvydas: (1) construed Section 1231(a)(6) as having "an implicit 'reasonable time' limitation," id. at 682; (2) concluded that continued detention of an alien previously admitted to the United States would no longer serve its purported immigration purpose if he could not be removed to another country, id. at 690, 699; and (3) determined that the implicit "reasonable time" limitation is best administered by creating a rebuttable presumption that detention

for more than six months is unreasonable if such an alien shows that removal is not reasonably foreseeable, see id. at 696-702. The Court was clear (and it is undeniable) that Section 1231(a)(6) itself does not establish a rigid six-month limitation on post-final-order detention of any alien. See id. at 701.

The rationales for imposing limitations on continued detention and for adopting six months as an administrative presumption in Zadvydas do not apply to aliens who have been stopped at the border and denied admission. As noted above, the Court's important conclusion in Zadvydas was "that the detention there did not serve its purported immigration purpose" -- facilitating removal -- once removal from the United States was determined not to be reasonably foreseeable. Demore v. Hyung Joon Kim, 123 S. Ct. 1708, 1719 (2003); see Zadvydas, 533 U.S. at 690, 699. By contrast, the detention of aliens who have been stopped at the border and ordered excluded effectuates the government's interest in preventing the aliens' unlawful entry into and physical presence in the United States in the first place. In this case, petitioner's 1994 exclusion order constitutes a determination that he should not be, and is not, allowed to enter the United States. Petitioner's continued detention thus implements the political Branches' power to exclude him. See Fiallo v. Bell, 430 U.S. 787, 792 (1977). As the Court said in Mezei, exclusion is "a fundamental sovereign attribute exercised by the Government's political departments," and the admission of an excluded alien may "nullif[y] the very purpose of the exclusion proceeding." 345 U.S. at 210, 216. Under the

analysis of Zadvydas, therefore, the detention of aliens stopped at the border and denied entry is reasonable and permissible beyond a six-month period.[4]

C. IIRIRA Did Not Change Established Law Allowing The Discretionary Detention of Mariel Cubans Under Section 1182(d)(5)(A) And Longstanding Agency Regulations

The application of Zadvydas's six-month rule to aliens who were stopped at the border and denied admission also conflicts with the parole provisions of 8 U.S.C. 1182(d)(5). Section 1182(d)(5)(A), which authorizes the temporary parole into the United States of aliens who are applying for admission, as well as the revocation of such parole, expressly makes the grant of parole entirely discretionary and makes its revocation mandatory once the Attorney General (now the Secretary of Homeland Security) determines that its purposes have been served.[5] Nothing in Section 1231(a)(6) or Zadvydas displaces either the independent authority

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[4] Detained aliens who have been ordered removed after being stopped at the border are entitled to annual custody reviews. See 8 C.F.R. 212.12(g) (Mariel Cubans), 241.4(k) (other aliens seeking admission). The rules applicable to petitioner, for example, permit release on parole if it is determined that he is presently nonviolent, is likely to remain nonviolent, is not likely to pose a threat to the community following his release, and is not likely to violate the conditions of his parole. 8 C.F.R. 212.12(d)(2). Procedural safeguards protect against arbitrary denials of parole. 8 C.F.R. 212.12(b), (c), (d) and (g). In September 2003, despite his nine felony convictions, petitioner was notified that he is a candidate for release, which would be accomplished through placement in a residential substance-abuse program. See pp. 8-9, supra.

[5] Aliens stopped at the border who have not been admitted to the United States are deemed for purposes of the immigration laws to be applicants for admission to the United States -- even if they are physically present in the United States, and without regard to whether a removal order has been entered. See 8 U.S.C. 1225(a)(1).

to grant or deny parole in the first instance to aliens like petitioner, or the statutory duty to revoke parole if the appropriate official is of the opinion that its purposes have been served.

Prior to the enactment of IIRIRA in 1996, the long-term detention of Mariel Cubans had been upheld by numerous courts and had been the subject of congressional hearings. See Barrera-Echavarria v. Rison, 44 F.3d 1441, 1447-1448 & nn. 4,5 (9th Cir.), cert. denied, 516 U.S. 976 (1995). As the court of appeals noted in this case (Pet. App. 25a), Congress sought through IIRIRA "to tighten immigration regulations," not to loosen them. Furthermore, Congress did not amend Section 1182(d)(5)(A) to restrict the Attorney General's discretion over parole decisions or to displace the longstanding regulations issued under Section 1182(d)(5)(A) that govern the detention and release of Mariel Cubans, and there is no mention of such a fundamental policy change in the legislative history of IIRIRA. To the contrary, Congress expressly ratified, in new 8 U.S.C. 1101(a)(13)(B), the longstanding rule that parole is not an admission of the alien into the United States. See Leng May Ma v. Barber, 357 U.S. 185, 190 (1958). In the context of IIRIRA as a whole, it is not plausible that Congress intended through new Section 1231(a)(6) to repeal the statutory and regulatory provisions governing detention of Mariel Cubans and to overturn the large body of judicial precedent upholding denials of parole to Mariel Cubans. See Guzman v. Tippy, 130 F.3d 64, 65 (2d Cir. 1997) (listing leading cases).

IV. THIS CASE IS A SUITABLE VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT ON THE IMPORTANT QUESTION PRESENTED

On June 23, 2003, this Court denied the government's petition for a writ of certiorari (No. 02-1464) to review the Sixth Circuit's en banc decision in Rosales-Garcia, supra. None of the circumstances that the respondents in that case cited as grounds for denying the certiorari petition exist here.

The Rosales-Garcia respondents contended (02-1464 Br. in Opp. at 8) that this Court's review of the detention issue was not warranted in their case because it had been "intensely contested" in that case whether 8 U.S.C. 1231(a)(6), or rather pre-IIRIRA law, governed the detention of those particular aliens. No such issue exists in this case. See note 3, supra. The Court's definitive construction of Sections 1182(d)(5)(A) and 1231(a)(6) in this case clearly would govern petitioner's detention, the detention of all inadmissible aliens stopped at the border and denied admission under post-1996 law, and the detention of all previously excluded aliens to whom Section 1231(a)(6) applies.[6]

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[6] In Zadvydas, the Court proceeded on the premise (with which both parties there agreed) that Section 1231(a)(6) applied to a lawful permanent resident alien whose deportation order was entered before IIRIRA's enactment. See 533 U.S. at 684, 688. The Sixth and Ninth Circuits have determined that Section 1231(a)(6) governs the detention of Mariel Cubans and other excludable aliens even if those aliens were ordered excluded under pre-IIRIRA law. See Martinez-Vazquez, 346 F.3d 903; Arango Marquez, 346 F.3d 892; Rosales-Garcia, 322 F.3d at 401-403. The Third Circuit has held that Section 1231(a)(6) applies to all excludable and inadmissible aliens except the narrowly defined and closed class of aliens who were "in deportation proceedings pending on April 1, 1997" (i.e., IIRIRA's effective date). Sierra, 2003 WL 22451726, at *7 (emphasis added). No court of appeals has adopted the view that the pre-IIRIRA detention provisions apply generally to aliens

The respondents in Rosales-Garcia further contended (02-1464 Br. in Opp. at 12) that their case "raise[d] a substantial question of mootness" because one had been released on parole and the other was due to complete a half-way house program in September 2003, before this Court would have heard oral argument and rendered its decision. See 02-1464 Pet. at 7, 11-12, 29-30 n.8 (discussing custody determinations in Rosales-Garcia and mootness issue); 02-1464 Reply Br. Pet. Stage at 6-7 (same). This case does not present a similar mootness question. Petitioner is currently in immigration detention and, although he has been approved for release through a substance-abuse treatment program, his completion of the program is not expected to occur before July 2004 at the earliest, which is after the end of the Court's current Term. See pp. 8-9, supra.

The respondents in Rosales-Garcia also contended (02-1464 Br. in Opp. at 14) that "there [wa]s at most a shallow split among the circuits" and that this Court should await "further percolation" of the detention issue in the courts of appeals. That "percolation" has occurred since the petition in Rosales-Garcia was denied. On July 16, 2003, the Eighth Circuit rejected a petition for rehearing en banc in Borrero and thus finalized its disagreement with the Sixth and Ninth Circuits and its agreement with the Fifth Circuit. On July 17, 2003, the Eleventh Circuit joined the Fifth and Eighth Circuits and held in the instant case that Zadvydas does not apply

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ordered removed under pre-IIRIRA law.

to the detention of a Mariel Cuban. On September 19, 2003, the Ninth Circuit extended its holding in Lin Guo Xi to the detention of an excludable Mariel Cuban who had been ordered removed before IIRIRA. See Arango Marquez, supra; see also Martinez-Vazquez, supra. And on October 29, 2002, the Third Circuit determined in Sierra that Zadvydas does not apply to the detention of a Mariel Cuban. Thus six circuits, covering States in which approximately 88% of the 2269 detained excludable and inadmissible aliens are being held, have weighed in on Zadvydas's application to such aliens. The well-developed conflict among those courts of appeals, on an issue of great practical and legal significance, warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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